No. 94-673

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

ROBERT L. GUYER, as an individual and Parent and Guardian, and MATTHEW C. GUYER, a minor, and BENJAMIN M. GUYER, a minor,

Petitioners,

vs.

THE SCHOOL BOARD OF ALACHUA COUNTY, FLORIDA and FRANK J. LAGOTIC, Chairman,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Florida

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Does the use of popular symbols of Halloween in a public elementary school's secular Halloween festivities violate the Establishment Clause of the First Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

The names of the Petitioners correctly appear in the caption of the case. However, Mr. Lagotic, named as a Respondent by the Petitioners, has not been Chairman of the School Board of Alachua County, Florida for several years and, therefore, is not correctly identified as a party to this action.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	2
Statement of the Case	2
Summary of Argument	4
Reasons for Denying the Writ	6
I. The trial court and the Florida District Court of Appeal both correctly determined as a matter of law that the use of popular symbols of Halloween in the public elementary school's Halloween festivities does not violate the Establishment Clause of the First Amendment.	6
II. Petitioners' First Amendment claim fails under the alternative "coercion test" of *Lee v. Weisman*, __ U.S. __, 112 S. Ct. 2649 (1992).	10
III. The decision below is not in conflict with the decision of any other state or federal appellate court.	11

Contents

Page

IV. There is no substantial case or controversy to be decided by this Court. 14

Conclusion 15

TABLE OF CITATIONS

Cases Cited:

Braxton v. United States, 111 S. Ct. 1854 (1991) 11

Brown v. Woodland Joint Unified School District, 27 F.3d 1373 (9th Cir. 1994) 5, 13, 14

Fleischfresser v. Directors of School District 200, 15 F.3d 680 (7th Cir. 1994) 5, 7, 8, 12

Guyer v. The School Board of Alachua County, Florida, 634 So. 2d 806 (Fla. 1st DCA 1994) 2, 7, 9

Lee v. Weisman, __ U.S. __, 112 S. Ct. 2649 (1992) 10, 11

Lemon v. Kurtzman, 403 U.S. 602 (1971) .....
.....4, 6, 7, 8, 9, 10, 12, 13, 15

Lynch v. Donnelly, 465 U.S. 668 (1984) 7, 8, 9, 14

Statute Cited:

28 U.S.C. § 1983 2

Contents

Page

United States Constitution Cited:

First Amendment, Establishment Clause ..... i, 2, 4, 5, 6, 8, 10, 12, 13, 14, 15

Rule Cited:

Supreme Court Rule 10.1 11

Other Authority Cited:

Florida Administrative Procedures Act 4, 11

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Respondent, The School Board of Alachua County, Florida, respectfully submits this Brief in Opposition to Petitioners' Petition for Writ of Certiorari and respectfully requests this Court to deny the petition.

OPINIONS BELOW

On cross motions for summary judgment, the Circuit Court for the Eighth Judicial Circuit, in and for Alachua County, Florida, entered an order granting Respondent's motion for summary judgment. The Florida First District Court of Appeal affirmed the trial court's summary judgment in a reported opinion. *Guyer v. The School Board of Alachua County, Florida*, 634 So. 2d 806 (Fla. 1st DCA 1994). The Supreme Court of Florida denied Petitioners' petition for review. Each of these decisions are reproduced in the Appendix to Guyer's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioners brought suit in state court pursuant to 28 U.S.C. § 1983 seeking to enjoin the use of popular symbols of Halloween in the public elementary schools in Alachua County during the Fall Halloween festivities in October 1988. Petitioners claimed that the Respondent was endorsing the alleged "Wiccan" religion in violation of the Establishment Clause of the First Amendment to the United States Constitution. The trial court determined as a matter of law that the use of popular symbols of Halloween in the public elementary schools' Halloween festivities did not violate the Establishment Clause of either the Florida or the United States Constitutions. In affirming the trial court's judgment, the Florida appellate court, in addition to those matters noted in Petitioners' statement of the case, also referenced to the record as follows:

> Appellees submitted the affidavit of the principal of Hidden Valley Elementary School, who stated that at the time in question, a number of teachers dressed in Halloween-related costumes, including a

> clown costume, a Ronald Reagan costume, and a witch costume; a member of the PTA put up a carnival poster which depicted a Halloween witch stirring a pot; some classes hold storybook dress-up day, where the teacher dresses as a book character; on one occasion, a teacher dressed as the witch from *The Wizard of Oz*; the book *Streganona,* an award-winning fairy tale with a witch character, has been read in conjunction with the festivities; these activities have been displayed in a secular and non-sectarian fashion and there has been no attempt to teach or promote wicca, satanism, witchcraft or any form of religion; costumes and decorations simply serve to make Halloween a fun day for the students and serve an educational purpose by enriching the educational background and cultural awareness of the students.[1]

The Florida appellate court further noted that the depictions of witches which Petitioners found offensive were displayed in combination with pumpkins, Ronald Reagan costumes, clown costumes, and other typical symbols of Halloween that today signify nothing more than the secular celebration of a traditional cultural event. [Petitioners' Appendix 10.] Moreover, there was no religious ceremony, reenactment of rituals, or any religious connotation whatsoever to the Halloween festivities. Importantly, no evidence was ever offered to suggest that anyone acted in furtherance of any religion whatsoever. [Petitioners' Appendix 9.]

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1. Included in the record is the school cafeteria calendar depicting a witch holding a wand, with the caption, "What's cooking?" [Petitioners' Appendix 5-6].

Finally, it should be noted that since this controversy was created by the Petitioners, the Respondent enacted a formal rule pursuant to the Florida Administrative Procedures Act designed to ensure that the recognition and observance of any religious holiday or the use of any symbols with potentially religious connotations is handled in a strictly neutral and secular fashion. Notwithstanding, Petitioner, Robert L. Guyer, withdrew his children from the public schools of Alachua County, Florida, and instead enrolled them in the Living Faith School, a school affiliated with the family's church.

SUMMARY OF ARGUMENT

This Honorable Court should not grant certiorari in this case because the Florida courts correctly construed the Establishment Clause of the United States Constitution by applying the controlling precedent of this Court. While Petitioners urge that this is not an appropriate case for the application of the *Lemon v. Kurtzman*, 403 U.S. 602 (1971) test followed by the lower court, such an assertion is irrelevant because Petitioners' claim would fail under any alternative First Amendment test to be applied by this Court. Moreover, there is absolutely no conflict between the decision of the Florida appellate courts in this case and the decisions of any other state or federal courts which have considered the constitutionality of the use of Halloween related symbols and themes in the public schools. In fact, the Florida appellate court relied heavily on the *Fleischfresser v. Directors of School District 200*, 15 F.3d 680 (7th Cir. 1994) decision in affirming the trial court's judgment in this case. The *Fleischfresser* decision has since been followed by the United States Court of Appeals for the Ninth Circuit in its recent opinion in *Brown v. Woodland Joint Unified School District*, 27 F.3d 1373 (9th Cir. 1994). Accordingly, not only is there no conflict to be resolved concerning the issue raised by the Petitioner in this case, there is an abiding unanimity of agreement among the courts which have considered the issue.

Ignoring this precedent, Petitioners now urge this Court to adopt instead a cost benefit analysis for determining the constitutionality of the use of Halloween related symbols in the public schools based upon Petitioners' subjective perception of religious offense. However, such a test would distort the First Amendment prohibition on the establishment of religion into a repealer of our national tradition of religious toleration. The First Amendment does not contemplate a vocal few being able to impose their views on the majority simply because of some subjective religious offense from objectively secular symbols or activities. Instead, as in this case when subjectively religious symbols are used as a part of an objectively secular activity or occurrence, no establishment or endorsement of religion has occurred and the First Amendment to the United States Constitution has not been infringed.

Accordingly, the Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I.

THE TRIAL COURT AND THE FLORIDA DISTRICT COURT OF APPEAL BOTH CORRECTLY DETERMINED AS A MATTER OF LAW THAT THE USE OF POPULAR SYMBOLS OF HALLOWEEN IN THE PUBLIC ELEMENTARY SCHOOL'S HALLOWEEN FESTIVITIES DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

The courts below followed the three-prong test established by this Court in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), in determining whether the contested activity in this case violated the Establishment Clause. Under the *Lemon* test, to satisfy the

Establishment Clause a government practice must (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) avoid excessive government entanglement with religion. *Id.* at 613. While there has been significant discussion concerning the continuing viability of the *Lemon* test, this Court has never overruled *Lemon v. Kurtzman* and the lower court's adherence to *Lemon* was certainly not in error.

First, the Respondents' use of popular symbols of Halloween in the public elementary school clearly had a secular purpose. The Florida First District Court of Appeal stated:

> In the present case, there is no doubt that the Halloween festivities and decorations serve a secular purpose. According to the school principal, the costumes and decorations serve to make Halloween a fun day for students and serve an educational purpose by enriching their educational background and cultural awareness. The record also reflects that this cultural celebration enhances a sense of community.

Guyer v. School Board Bd. of Alachua County, 634 So. 2d 806, 808 (Fla. 1st DCA 1994).

In fact, in considering the first prong of the *Lemon* test, this Court "has invalidated legislation or governmental action on the grounds that a secular purpose was lacking, but only when it has concluded that there was no question that the statute or activity was motivated *wholly by religious considerations.*" *Lynch v. Donnelly,* 465 U.S. 668, 678 (1984) (emphasis added). In *Lynch* this Court ultimately held that a nativity scene in the City of Pawtuckett, Rhode Island's Christmas display did not violate the

Establishment Clause of the United States Constitution. This Court stated: "The display is sponsored by the city to celebrate the holiday and to depict the origins of the holiday. These are legitimate secular purposes." *Id.* at 682. In the instant case, it can hardly be said that the actions of the Respondents in allowing teachers to dress up for Halloween or to decorate the schools with Halloween related seasonal decorations has a stronger religious purpose than the nativity scene allowed in *Lynch.*

Moreover, as the Florida District Court of Appeal noted in footnote 2 of its opinion, the Seventh Circuit Court of Appeals recently determined that Halloween is a secular holiday for purposes of the first prong of the *Lemon* test. *See, Fleischfresser v. Directors of School District 200,* 15 F.3d 680, 688 (7th Cir. 1994). In *Fleischfresser,* parents of elementary school children challenged a series of elementary school readers on First Amendment grounds because a few of the stories mentioned witches and goblins. *Id.* at 688. The Seventh Circuit noted:

> Many of the stories involving witches are sequenced to emphasize a Halloween theme. The American tradition of celebrating the Eve of All Saints' Day is certainly a secular one.

Id. at 688, n.8.

With respect to the second prong of the *Lemon* test, government action is proper if its primary effect is neither to advance nor inhibit religion. For government action to violate the second prong of the *Lemon* test, that action must amount to an endorsement of religion. *Lynch, supra,* 465 U.S. at 681; *Fleischfresser, supra,* 15 F.3d at 688. In this regard, the fact that some objects which have a secular and non-sectarian connotation to the vast majority of individuals in our society may have some arcane religious significance to others in the minority does not by

necessity mean that the rest of society is to be precluded from the use of these symbols in a secular and non-sectarian context in the public schools. *See, Lynch, supra,* 465 U.S. at 682. (the Establishment Clause is not violated because government action "happens to coincide or harmonize with the tenets of some . . . religions"); *Fleischfresser, supra,* 15 F.3d at 689. Significantly, in *Fleischfresser,* the court stated that the School District's use of witches and goblins in a series of elementary school readers did not violate the Establishment Clause just because these symbols happen to coincide with the tenents of some religions. 15 F.3d at 689.

In the instant case, the depictions of witches were displayed in combination with pumpkins and other typical symbols of Halloween and the festivities included other costumes such as clown costumes, Ronald Reagan costumes and other dress-up costumes. The Florida District Court of Appeal analyzed the second prong as follows:

> Thus the question in this case boils down to whether the principle or primary effect of the celebration, including depictions of the symbols appellants object to, is the endorsement or promotion of religion. We are firmly convinced that it is not.

Guyer, supra, 634 So. 2d 806, 808. The fact of the matter is there simply was no state endorsement of religion whatsoever.

Third, the Florida District Court of Appeal found that the conduct at issue did not violate the third prong of the *Lemon* test because: "the Halloween festivities and decorations do not foster any excessive entanglement between government and religion." *Id.* at 808. The only possible entanglement with religion that the Petitioners can complain of in this case is that controversy which

they themselves have created. This Court has made it clear that "[a] litigant cannot, by the very act of commencing a lawsuit, however, create the appearance of divisiveness and then exploit it as evidence of entanglement." *Lynch, supra,* 465 U.S. at 685. Further, as the Florida District Court of Appeal stated:

> No evidence was offered to show that anyone acted in furtherance of any religion and as such had any involvement whatsoever with the school Halloween celebration, nor was there any argument to that effect.

Guyer, supra, 634 So. 2d 806, 808. Plainly, the court below correctly applied the *Lemon* test and accordingly, the Petition for Writ of Certiorari should be denied.

II.

PETITIONERS' FIRST AMENDMENT CLAIM FAILS UNDER THE ALTERNATIVE "COERCION TEST" OF *LEE V. WEISMAN,* __ U.S. __, 112 S. CT. 2649 (1992).

Petitioners have understandably had difficulty throughout the course of this litigation in dealing with the applicability of the *Lemon* test, and would now seek to have this Court formally declare *Lemon* simply a "ghost" of the past. However, this Court should not be spooked by this argument into granting certiorari in this case. Application of any other tests discussed by this Court in other Establishment Clause opinions would not affect the outcome in this case. The most frequently discussed "test" in the recent Establishment Clause cases appears to be the "coercion test" seemingly applied by this Court in *Lee v. Weisman,* 112 S. Ct. 2649 (1992). In *Lee,* this Court declined the opportunity to reconsider its decision in *Lemon* because the Court found there to

be coercion on the graduates to join in a formal religious exercise. *Id.* at 2655. Of course, the *Lee* coercion test would not be applicable to this case because there was no formal religious exercise or prayer of any sort and not even any suggestion that such occurred. On the other hand, in *Lee,* this Court found as follows:

> State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory. . . .

Id. at 2665.

In this case not only was the Respondent not associated with any formal religious exercise, there was no obligation on the part of Petitioner Robert L. Guyer's children to participate in the Halloween festivities. In fact, the record reflects that children whose parents for whatever reason, or the children themselves, who do not desire to participate in the festivities were allowed to go to the school media center for other activities. Moreover, the school board's formal administrative policy enacted pursuant to the Florida Administrative Procedures Act expressly provides that "[s]chool sponsored programs or activities shall be strictly neutral with respect to religion, neither favoring, disfavoring, approving, disapproving, endorsing, nor opposing religion in general or any particular religion. Students and staff members shall be excused from participating in school activities which are contrary to their religious beliefs." Accordingly, applying the analysis used in *Lee v. Weisman, supra,* would not alter the result in this case and the Petition for Certiorari should therefore be denied.

III.

THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER STATE OR FEDERAL APPELLATE COURT.

A principle purpose for which this Court historically uses its certiorari jurisdiction is to resolve conflicts among the circuit courts of appeal and state courts concerning the meaning of provisions of federal law. *See Braxton v. United States,* 111 S. Ct. 1854, 1857 (1991); Sup. Ct. R. 10.1. However, in this case, there is absolutely no conflict between the decision of the Florida First District Court of Appeal and any other state or federal appellate court of which the parties are aware. In fact, Petitioners have not even urged that such a conflict exists or that such a conflict might be a basis for granting certiorari in this case. The obvious reason for Petitioners' omission in this regard is that other reported decisions addressing the use of Halloween symbols in the public schools are in concurrence with the decision of the Florida appellate court in this case.

In *Fleishfresser v. Directors of School District 200,* 15 F.3d 680 (7th Cir. 1994), the court was confronted with a First Amendment claim concerning the use of the *Impressions* reading series in a public school curriculum. The reading series allegedly included references to supernatural beings including "wizards, sorcerers, giants and unspecified creatures with supernatural powers". *Fleischfresser* at 683. Many of the stories in the reading series included works that involve fantasy and make-believe to a significant degree. Significantly, the reading series relied on witches and goblins in a few stories and many of the stories involving witches were sequenced to emphasize a Halloween theme. The parents in *Fleischfresser* objected to the inclusion of these works in the curriculum contending, as Petitioners in this case, that the inclusion of these works represents the impermissible establishment of a pagan religion in the schools.

The *Fleischfresser* court found that there was no violation of the First Amendment. As in this case, the *Fleischfresser* court was doubtful that there was any establishment of religion at all. However, the court proceeded to analyze the use of the *Impressions* reading series in the public schools within the framework of the *Lemon v. Kurtzman* test. As in this case, the Seventh Circuit found that the use of make-believe and fantasy, including the use of a few witches and goblins in the stories, served a secular purpose. In fact, at footnote 8 of its opinion at page 688, the court specifically noted that "[t]he American tradition of celebrating the eve of All Saints's Day is certainly a secular one."

Similarly, the *Fleischfresser* court found that the second prong of the *Lemon* test had not been offended by the use of the series because the principle or primary effect of its use was not to endorse religion. Not only were there references in the reading series to witches and Halloween themes, there were references to Christian and Protestant holidays as well. Finally, the court found that the third prong of the *Lemon* test had not been violated since there was no governmental entanglement with religion. Of course, the record in this case is devoid of any such governmental entanglement with religion as well.

This same reading series again came under constitutional attack in *Brown v. Woodland Joint Unified School District,* 27 F.3d 1373 (9th Cir. 1994). The parents in the *Brown* case contended that a number of these stories required children to practice the "religion" of witchcraft in violation of the Establishment Clause of the United States Constitution. Like the Petitioners in this case, the Browns contended that certain selections in the series promoted the practice of Wicca. A little more amplification concerning the content of the series is provided in the *Brown* decision and it is pointed out in that case that the challenged selections asked children to discuss witches

or to create poetic chants. In fact, some selections asked students to pretend that they are witches or sorcerers and asked them to role play the characters in certain situations. Plainly, these exercises noted in the record of the *Brown* case go far beyond any activities of which Petitioners complain in the instant case. However, the United States Court of Appeals for the Ninth Circuit applied the *Lemon* test to the Browns' claim and determined that there was no violation of the Establishment Clause in that case.

The *Brown* court noted that the relevant inquiry "is whether the government's action actually conveys a message of endorsement of religion in general or of a particular religion." *Brown*, at 1378. Interestingly enough, in answering this question the court considered at length the very issue urged upon this Court by Petitioners. Specifically, the Browns urged, as do Petitioners, that their subjective perception that a state action disapproves of or is hostile towards one's religion is determinative for purposes of First Amendment analysis. Instead, the Ninth Circuit concluded that the appropriate standard is whether an objectively reasonable observer in Petitioners' position would believe there to be an endorsement of religion. The *Brown* court concluded that neither the references to witches and goblins or the fantasy exercises caused students to reasonably believe that they were participating in religious ritual and, therefore, did not offend the Establishment Clause.

Moreover, the Browns urged, like Petitioners in this case, that the use of allegedly religious symbols be weighed against its secular purpose and argued that the unnecessary use of religious symbols or rituals was unconstitutional. The Ninth Circuit Court of Appeals concluded, however, that as long as there is a secular means being used, the state is not required to use an alternative secular means that is less likely to be associated with religion. This proposition appears to be a recurring theme in this Court's

First Amendment jurisprudence. *See Lynch v. Donnelly,* 465 U.S. 668 (1984). To now suddenly require state officials to weigh the secular purpose in a particular activity against the subjective offense of various citizens groups would not only turn First Amendment case law on its head, it would place the state in the very role of making religious judgment calls which the First Amendment certainly prohibits.

IV.

THERE IS NO SUBSTANTIAL CASE OR CONTROVERSY TO BE DECIDED BY THIS COURT.

Finally, as noted by Petitioners, the Respondent has taken action to minimize any potential subjective religious offense which Petitioners, or others similarly situated, might sustain as a result of the use of Halloween related symbols and other seasonal festivities. Both the Respondent's policy at the time in question, as well as the formal administrative policy adopted by Respondent, clearly avoid the endorsement of religion and are carefully tailored to accommodate religious diversity. Nothing more is required by the First Amendment. Moreover, Petitioner Robert L. Guyer's children are no longer enrolled in the public schools of Alachua County, Florida and thus there is no substantial case or controversy for this Court to decide. As the Florida First District Court of Appeal noted, "[w]itches, cauldrons, and brooms in the context of a school Halloween celebration appear to be nothing more than a mere 'shadow', if that, in the realm of Establishment Clause jurisprudence." This Court need not bother itself ruminating about the ghost of *Lemon,* or any other perceived specters in the shadows of First Amendment jurisprudence, simply to alleviate the subjective concerns of an overly sensitive parent and his children.

CONCLUSION

Accordingly, for the foregoing reasons, Petitioners' request for a Writ of Certiorari should be denied.

Respectfully submitted,

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